



Federal Communications Commission  
Washington, D.C. 20554

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DA 20-1355

## **SMALL ENTITY COMPLIANCE GUIDE**

**Leased Commercial Access;  
Modernization of Media Regulation Initiative**

**FCC 20-95  
MB Docket Nos. 07-42, 17-105**

**This Guide is prepared in accordance with the requirements of section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It is intended to help small entities—small businesses, small organizations (non-profits), and small governmental jurisdictions—comply with the revised rules adopted in the above-referenced Federal Communications Commission (FCC or Commission) rulemaking dockets. This Guide is not intended to replace or supersede these rules, but to facilitate compliance with the rules. Although we have attempted to cover all parts of the rules that might be especially important to small entities, the coverage may not be exhaustive. This Guide cannot anticipate all situations in which the rules apply. Furthermore, the Commission retains the discretion to adopt case-by-case approaches, where appropriate, that may differ from this Guide. Any decision regarding a particular small entity will be based on the statute and any relevant rules.**

**In any civil or administrative action against a small entity for a violation of rules, the content of the Small Entity Compliance Guide may be considered as evidence of the reasonableness or appropriateness of proposed fines, penalties or damages. Interested parties are free to file comments regarding this Guide and the appropriateness of its application to a particular situation. The FCC will then consider whether the recommendations or interpretations in the Guide are appropriate in that situation. The FCC may decide to revise this Guide without public notice to reflect changes in the FCC's approach to implementing a rule, or it may clarify or update the text of the Guide. Direct your comments and recommendations, or calls for further assistance, to the FCC's Consumer Center:**

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## **I. OBJECTIVES OF THE PROCEEDING**

The Commission's leased access rules direct cable operators to set aside channel capacity for commercial use by unaffiliated video programmers. In the Second Report and Order in MB Docket Nos. 07-42 and 17-105 (2020 Leased Access Order), the Commission modified its leased access rate formula to reflect changes to cable rate regulation over the years, as part of its ongoing Modernization of Media Regulation Initiative. Leased access rates will now be calculated using information specific to the tier of carriage, as opposed to the previous weighting scheme that used data from all tiers with subscriber penetration over 50 percent. This modification will more accurately approximate the value of a particular channel, while alleviating burdens on cable operators.

Ultimately, the revised rate formula should result in operators using revenue and cost estimates that more closely reflect the value of channels sought, thus better serving the statutory goals. The Commission concluded in its 2020 Leased Access Order that tier-specific rates are the fairest approximation of the "maximum reasonable rate" an operator may charge because it will be based on the actual programming revenue and costs associated with that specific tier. This simplified approach will benefit small cable operators, as well as other cable operators.

Additionally, the Commission stated in the 2020 Leased Access Order that the constitutional foundation for the leased access regime is in substantial doubt due to changes in marketplace conditions. These changes—such as increased Internet usage and availability, as well as competition from other multichannel video programming distributors (MVPDs) and online video distributors—appear to have eroded the original justification for the leased access rules: to safeguard competition and diversity in the face of cable operators' monopoly power. However, the Commission also stated that the leased access rules are required pursuant to a specific statutory mandate<sup>1</sup> from Congress. As a result, the Commission has declined to eliminate its leased access requirements and has left it to the courts to address the current constitutional status of the leased access statute, particularly given that the D.C. Circuit has previously upheld the constitutionality of the leased access statute,<sup>2</sup> albeit under different marketplace conditions.

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<sup>1</sup> 47 U.S.C. § 532.

<sup>2</sup> See *ValueVision, Inc. v. FCC*, 149 F.3d 1204 (D.C. Cir. 1998).

## II. COMPLIANCE REQUIREMENTS

**Tier-Based Fee Calculation.** Pursuant to the 2020 Leased Access Order, the average implicit fee will continue to reflect the maximum rate that a cable operator may charge a leased access programmer per month for a full-time channel. However, the formula for the new tier-specific calculation can now be mathematically expressed as follows:

$A = (R_T - K_T) \left( \frac{1}{C_T} \right)$			
A	=	Maximum Full-Time Rate Per Month	
T	=	Elected Tier	
R	=	Total Tier Monthly Subscriber Revenue	
K	=	Total Tier Monthly Programming Costs	
C	=	Number of Channels	

In other words—pursuant to 47 C.F.R. § 76.970(e) as amended—the average implicit fee will now be calculated by:

- (1) Determining the operator's total subscriber revenue per month for programming on the tier where the leased channel will be placed,
- (2) Subtracting the total amount the operator pays in programming costs per month for that tier, and
- (3) Dividing the resulting figure by the number of channels on that tier.

This tier-specific rate calculation is the same method used previously for channels placed on tiers with less than 50 percent subscriber penetration. It represents a more accurate assessment of the channel's value on that particular tier. Rates are likely to decrease if leased access programmers request channel capacity on less profitable tiers, whereas rates are likely to rise if programmers request channel capacity on more profitable tiers.

**Annual Calculation.** In the 2020 Leased Access Order, the Commission also codified the determination set forth in its 1993 Rate Regulation Order, which provided that the average implicit fee shall be calculated annually based on contracts in effect in the previous calendar year, rather than at the time of each request.

## III. RECORDKEEPING AND REPORTING REQUIREMENTS

The Commission's actions in the 2020 Leased Access Order did not create any additional recordkeeping or reporting requirements.

## IV. IMPLEMENTATION DATE

The amended rules shall become effective 30 days after the date of publication in the Federal Register, which is on September 21, 2020.

## **V. INTERNET LINKS**

A copy of the Second Report and Order, FCC 20-95, MB Docket Nos. 07-42 and 17-105 is available at: <https://docs.fcc.gov/public/attachments/FCC-20-95A1.pdf>.

A copy of the Federal Register Summary of the Second Report and Order is available at: <https://www.govinfo.gov/content/pkg/FR-2020-08-20/pdf/2020-16557.pdf>.